On the other hand if *Haji Abdul Rahman's* case (*supra*) is considered to have the effect of preventing the creation of an equitable charge, the effect of the decision cannot be extended to other cases. In that case the agreement was held void as a transfer or as a burdening instrument because it contravened section 4 of the (Selangor) Registration of Titles Regulation 1891. This section prohibited the transfer, transmission or the creation of any mortgage or charge, or otherwise dealt with except in accordance with the provision of this Regulation, and 'every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of none effect...' And section 41 enacted that 'whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Schedule E, which must be registered as hereinbefore provided'.

But the subsequent Land Code and the present National Land Code do not contain provisions similar to section 4 of the above quoted Regulation, although the Codes make provisions as to how a charge or a lien can be created. Examination of court's decisions clearly show that the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien, within the provisions of the National Land Code or the previous Code is executed or created. (see *Ngan Khong* v. *Bamah bt. Pakeh Jamin & Anor.* [1935] F.M.S.L.R. 81); *Arunasalam Chetty* v. *Teah Ah Poh Trading* (*supra*); *Vallipuran Sivaguru* v. *Palaniappa Chetty* ([1937] M.L.J. 59) and *Mercantile Bank* v. *Official Assignee* ([1969] 2 M.L.J. 196). The basis of this ruling is the very raison d'etre of the court's own existence and the imputed intention of the legislature. Terrell Ag. C.J. in *Arunasalam Chetty's* case (*supra*) said:

> '... It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds ...' (p.22)
>
> '... but it is difficult to believe that it was the deliberate intention of the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit.' (p.21)

These statements were supported by Whitley Ag. C.J. (S.S.) who sat in the same case and said:

> '... the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes.' (p.18)

Raja Azlan Shah J. (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd.* case (*supra*) when he said:

> '... in the Act, this court is not precluded from giving effect to equitable rights existing between the parties ...' (p.197)."

On the issue whether time is the essence of the contract, I rely on the decision of Ibrahim J. in *Ismail bin Haji Embong* v. *Lau Kong Han*[3] where on the facts, it was held that although time for the exercise of the option to repurchase had expired, time was not of the essence of the contract, as, even if time was originally of the essence of the contract it had been allowed to pass and the conduct of the parties clearly showed that it was no longer so.

Conclusion

For the above reasons I gave judgment to the plaintiff on the following terms:

1) The said property be reconveyed free from any encumbrances to the plaintiff within three months upon payment by the plaintiff to the defendant the sum of $12,000.

2) The Collector of Land Revenue Butterworth do give effect to the transfer as per Order of Court.

3) The defendant do pay the costs to this action to the plaintiff to be taxed by the proper officer of the court.

Judgment for the plaintiff.

Solicitors: *V. Muthusamy & Co.; Natha Singh & Co.*

E.M. BUXTON & ANOR. v. PACKAGING SPECIALISTS SDN. BHD.

[O.C.J. (Siti Norma Yaakob J.) February 21, 1986]

[Kuala Lumpur – Originating Motion No. F51 of 1985]

Conveyancing – Sale and purchase agreement – Balance of purchase price not paid – Deposit forfeited – Whether purchaser has interest for which caveat can be lodged.

Land Law – Caveat – Who may lodge – Whether respondent entitled to obtain title or interest in land.

On May 10, 1984 the applicants entered into a sale and purchase agreement, wherein they agreed to sell their freehold land, together with a single storey detached house to the respondent for a consideration of $445,000. The respondent paid the initial deposit of $45,450 and the balance of the purchase price was to be settled not later

than 3 months from the date of the agreement. In the event of its default, the applicants were entitled to treat the agreement as being terminated and to forfeit the deposit paid to account. The respondent failed to pay the balance of the purchase price. The deposit was forfeited. The respondent lodged a caveat over the land to protect its interest on October 17, 1984. It also filed a civil suit C.4021/84 against the applicants seeking a refund of the deposit, reimbursement for all expense incurred and general damages on the ground that the applicants had breached clause 10 of the sale and purchase agreement. The issue that arose was whether the respondent had a registerable interest over the land capable of being protected by a caveat.

Held: (1) the respondent was not claiming specific performance of the agreement and by so doing the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only to seek a refund of the deposit and other expenses incurred. To that end it cannot be said that it had any interest in the land capable of being registered;

(2) as the only persons who can lodge a caveat are those entitled to obtain a title or interest in land and since the respondent has demonstrated that it was no longer interested to acquire such interest, it cannot insist that the caveat be allowed to remain;

(3) from the nature of its civil suit, the respondent has only a claim *in personam* against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim.

Case referred to:

(1) *Mahadevan & Anor.* v. *Patel* [1975] 2 M.L.J. 207.

ORIGINATING MOTION.

Izabella De Silva (Mrs.) for the applicants.

P.C. Choong for the respondent.

Cur. Adv. Vult.

Siti Norma Yaakob J. : On May 10, 1984 the applicants entered into a sale and purchase agreement, wherein they agreed to sell their freehold land held under Grant No. 8069, Lot 3308, Mukim of Kuala Lumpur, together with a single storey detached house to the respondent for a consideration of $445,000. The respondent paid the initial deposit of $45,450/- and the balance of the purchase price was to be settled not later than 3 months from the date of the agreement from a loan to be obtained by the respondent and in the event of its default, the applicants were entitled to treat the agreement as being terminated and to forfeit the deposit paid to account.

The respondent failed to settle the balance of the purchase price on the due date and explains its failure to do so by alleging that the applicants had breached clause 10 of the agreement and it had on August 29, 1984 informed the applicants that it was repudiating the agreement and demanded the refund of the deposit and other disbursements incurred. Clause 10 of the agreement contains a warranty or undertaking by the applicants that they have not been served with any notice of any intended acquisition of the land by any authority or that they were aware of any such intended acquisition. However, before the completion date, the respondent discovered that 56% of the land was intended to be acquired by Dewan Bandaraya for the purpose of constructing a link road connecting Jalan Sungei Besi to Jalan Cheras.

Denying any knowledge of such intended acquisition, the applicants, by letter dated September 12, 1984 refused to accept the respondent's repudiation of the agreement. In turn, they had by their letter dated October 11, 1984 notified the respondent that they were also terminating the agreement for the respondent's breach in failing to pay the balance of the purchase on the due date and they forfeited the deposit. The respondent rejected this purported termination and to protect its interest over the land, lodged a caveat on October 17, 1984. Following this, it also filed a civil suit, C.4021/84 against the applicants seeking a refund of the deposit, reimbursement for all expenses incurred and general damages on the ground of the applicants' breach of clause 10.

From the pleadings in the civil suit, it is clear that both sides had alleged breaches of the agreement against each other, both had, as a result, terminated the agreement and both had rejected the other's purported termination.

It is against such a background that the applicants now seek to have the caveat removed on the ground that the respondent has no registerable interest on the land. The respondent considers it otherwise and it contends that it has the right to retain the caveat until after the disposal of the civil suit so that the *status quo* of both parties can be maintained.

Thus the only issue before me is whether the respondent has a registerable interest over the land capable of being protected by a caveat. The respondent admits that although it is claiming for an unsecured debt in the civil suit, nonetheless such a claim can be protected by a caveat as the debt arose out of a land transaction pursuant to a sale

and purchase agreement and it is the validity of the termination of the agreement that is disputed in the civil suit. It goes further to state that as the debt is linked to the agreement, the caveat should be allowed to remain until after the disposal of the civil suit. For this contention the respondent relies on the decision of the Federal Court in *Mahadevan & Anor.* v. *Patel*[1] where the facts show that in reliance of an arrangement, that one Ratnavale, the proprietor of 2 pieces of land would charge his properties to secure a loan, the respondent lent him $225,000/-. Ratnavale, however, did not charge his lands and to protect his interest, the respondent lodged a caveat. On Ratnavale's death, his executors and trustees, the appellants applied to have the caveat removed. The application was dismissed and on appeal, the decision was upheld on the ground that as it was the intention of both parties that the loan should be secured, the respondent had a cavetable interest over the land.

The facts before me are quite different. To begin with, it is not a loan transaction but the sale and purchase of property. The caveat was lodged after the respondent discovered that the area of the property he was to purchase would be greatly reduced by the intended acquisition of the land by Dewan Bandaraya and to protect its interest under the agreement, it lodged the caveat and subsequently filed a civil suit against the applicants seeking a refund of the deposit paid to account and other sums alleged to have been incurred. It is not claiming specific performance of the agreement and by so doing, the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only to seek a refund of the deposit and other expenses incurred. To that end, it cannot be said that it had any interest in the land capable of being registered. As the only persons who can lodge a caveat are those entitled to obtain a title or interest in land and since the respondent has demonstrated that it was no longer interested to acquire such interest, it cannot insist that the caveat be allowed to remain. From the nature of its civil suit, the respondent has only a claim *in personam* against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim. Admittedly, such a claim originated from the agreement but it is not capable of being registered under our Torrens System of registration. It is simply a claim for an unsecured debt and for this very reason, I allow this application in terms of prayers 1 to 3 of this Originating Motion. For the same reasons, I make a similar order in Originating Motion F.52/85.

Order accordingly.

Solicitors: *Chooi & Co.; Choong & Co.*